IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1379

CLIFFORD ARTHUR FORKERT

vs.

PEOPLE OF THE STATE OF CALIFORNIA

On Motion for a Writ of Certiorari to the Superior Court of the State of California for the County of Los Angeles, Appellate Department.

PETITION FOR WRIT OF CERTIORARI.

LESLIE A. KAST,
1500 West Covina Parkway,
West Covina, Calif. 91790,
(213) 962-6996,
Attorney for Petitioner.

EISCHEN & KAST, INC.,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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PETITION FOR WRIT OF CERTIORARI.

Pursuant to Rule 23 of the Supreme Court of the United States, the following information in support of this petition is submitted:

Jurisdictional Statement.

1. The Opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles is unreported in this case of Clifford Arthur Forkert v. People of the State of California, No. CR A 12082. A copy of that Opinion is attached and made a part hereof as Exhibit "A".

2. Judgment of Conviction was entered on December 7, 1972 by the Municipal Court of the Alhambra Judicial District in the County of Los Angeles, State of California for one count of violating Section 23102

(a) of the California Vehicle Code: Misdemeanor Drunk Driving. On Appeal to the Appellate Department of the Superior Court the Judgment was affirmed. The Judgment on Appeal issued on December 11, 1973, is unreported but attached as Exhibit "A" hereto. A petition for rehearing was filed December 17, 1973 and was denied December 28, 1973. A Copy of the Court's denial is attached as Exhibit "B". This Court has jurisdiction to review the Judgment of Conviction by a Writ of Certiorari pursuant to 28 U.S.C. 1257.

Questions Presented.

3. The following questions are presented for review:

(a) WAS THE TRIAL COURT'S DETERMINATION THAT THE PRIOR CONVICTION OF APPELLANT WAS CONSTITUTIONAL AGAINST THE DECISIONAL LAW OF THE SUPREME COURT OF THE UNITED STATES AND THE SUPREME COURT OF THE STATE OF CALIFORNIA?

(b) DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AT TRIAL AS A PROPER FOUNDATION WAS NOT ESTABLISHED BY THE PEOPLE?

Constitutional Provisions and Statutes.

4. The constitutional provisions involved in this petition are embodied in the following:

"AMENDMENT V, U.S. CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"AMENDMENT VI, U.S. CONSTITUTION:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

"AMENDMENT XIV, U.S. CONSTITUTION:
. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CALIFORNIA VEHICLE CODE SECTION 23102. MISDEMEANOR DRUNK DRIVING:

(a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway. Any person convicted under this

section shall be punished upon a first conviction by imprisonment in the county jail for not less than 30 days nor more than six months or by fine of not less than two hundred fifty dollars ($250) nor more than five hundred dollars ($500) or by both such fine and imprisonment and upon a second or any subsequent conviction, within seven years of a prior conviction, by imprisonment in the county jail for not less than five days nor more than one year and by a fine of not less than two hundred fifty dollars ($250) nor more than one thousand dollars ($1,000). A conviction under this section shall be deemed a second conviction if the person has previously been convicted of a violation of Section 23101 of this code.

(b) If any person is convicted of a second or subsequent offense under this section within seven years of a prior conviction and is granted probation, it must be a condition of probation that such person be confined in jail for at least five days but not more than one year and pay a fine of at least two hundred fifty dollars ($250) but not more than one thousand dollars ($1,000).

Statement of the Case.

5. Statement of the Case.

This Petition results from a Judgment of Conviction and Sentence in the Municipal Court of the Alhambra Judicial District on a one count complaint of violation of Section 23102(a) of the California Vehicle Code. The complaint was based on an arrest of appel-

lant on May 6, 1972 and stated that, before that arrest, appellant was convicted in the Municipal Court of the Whittier Judicial District on or about March 10, 1972 of violation of Section 23102(a) of the California Vehicle Code. (Clerk's Transcript, complaint; hereinafter referred to as C.T.).

On May 12, 1972, appellant was arraigned; appellant not being present but represented by counsel, pled not guilty to charge and did not waive trial by jury.

On August 4, 1972, appellant through counsel filed Notice of Motion to Strike Prior Conviction on Constitutional Grounds, Attorney's Declaration in Support Thereof and Points and Authorities. Said notice of motion, declaration and points and authorities are included in the Clerk's Transcript. That motion was denied on September 27, 1972 and again on December 6, 1972 at commencement of trial.

The trial court had the duty under *Thomas v. Department of Motor Vehicles,* 3 Cal.3d 335, 90 Cal. Rptr. 586, and *Neal v. State of California,* 55 Cal.2d 11, 16, 9 Cal.Rptr. 607, 609, to hear and determine the matter of the motion to strike prior conviction on constitutional grounds on its merits. Under *Boykin v. Alabama,* (1969) 395 U.S. 238, and *In re Tahl,* (1969) 1 Cal.3d 122, 81 Cal.Rptr. 577, the prior conviction is unconstitutional and in making its decision on September 27, 1972 (see docket sheet, Clerk's Transcript), the trial court failed to perform its duty when it failed to strike the prior. The *Boykin* and *Tahl* cases were cited to the trial court in the Motion to Strike and raised the federal issues:

> "A defendant may raise the validity of prior convictions which will effect his sentence in the trial

court where the subsequent action is heard. The following steps must be taken to deny a prior conviction:

1. Defendant must deny or move to strike prior offense.
2. Prosecution must prove prior offense.
3. Defendant has the burden to show cause why the prior conviction is invalid.
4. If defendant carries the burden, prosecution is entitled to rebuttal.
5. The court will make its findings based on the evidence as to the validity of the prior conviction.

People v. Coffee, 67 Cal.2d 204, 60 Cal.Rptr. 459;

In re Coffee, 68 Cal.2d 769, 773;

People v. Coleman, 71 Cal.2d 1159, 1169;

People v. LoCicero, 71 Cal.2d 1186, 1[illegible]

A defendant must personally waive his right to a jury trial in California.

People v. Holmes, 54 Cal.2d 442, 6 Cal.Rptr. 871, 353 P.2d 583.

6. While the prosecution may introduce official court records for the purpose of rebutting the defendant's testimony as to what went on at the court proceedings where the prior convictions were sustained, waiver may not be presumed from a silent record.

Carney v. Cochran, (1962) 369 U.S. 506, 8[illegible] S.Ct. 884, 8 L.Ed.2d 70.

7. Plea of guilty cannot stand unless record in some manner indicates free and intelligent

waiver of defendant's right against compulsory self-incrimination, right to trial by jury, and right to confront one's accusers and indicates an understanding of nature and consequences of plea, and judge must actively participate in canvassing matter with accused.

Waiver by counsel of a defendant's right to jury trial is not sufficient, and fact that accused was advised by counsel would not be sufficient to show waiver of right to jury trial. West's Ann. Const. Art. I, para. 7.

In re Tahl, (1969) 1 Cal.3d 122, 81 Cal.Rptr. 577.

As can be seen from the attached docket sheet, defendant was never present in court. The attorney appeared to enter guilty plea; but there was no canvassing on March 10, 1972, as set forth *In re Tahl,* (1969) 1 Cal.3d 122, 81 Cal.Rptr. 577, as the judge must personally canvass the defendant.

It does mean that the record must contain on its face direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea. Each must be enumerated and responses elicited from the person of the defendant. Because mere inference is no longer sufficient, the presence of an attorney cannot alone satisfy these requirements; as noted, the defendant in Boykin was represented by counsel.

In re Tahl, (1969) 1 Cal.3d 122, 81 Cal.Rptr. 577;

Boykin v. Alabama, (1969) 395 U.S. 238, 89 S.Ct. 1709.

Based upon the foregoing record, it would appear that since the defendant did not appear at any time, defendant has at no time been canvassed by a judge nor made aware of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea in person."

On September 27, 1972, the case was called for jury trial. On appellant Forkert's motion, the docket sheet in error refers to Motion to Strike Prior Conviction on Constitutional Grounds as follows, "proceedings proceed as to motion to suppress pursuant to Section 1538.5 Penal Code". People's exhibits received into evidence were a certified copy docket sheet, waiver of time and waiver of constitutional rights of the prior conviction in the Whittier case. The motion was denied.

On October 4, 1972, appellant filed in Department 70 of the Superior Court of Los Angeles County, State of California, a Petition for Writ of Mandate with Supporting Memorandum of Points and Authorities, No. C 40270. This Petition was for a writ requiring the trial court to grant the motion to strike the prior conviction on constitutional grounds.

On October 11, 1972, the Superior Court of Los Angeles County, State of California, acting by and through the Honorable Ernest Zack, denied petitioner's Petition for Writ of Mandate.

Thereafter, a Petition for Writ of Mandate was filed in the Court of Appeal, Second Appellate District, State of California on the same basis. That petition

was filed on November 13, 1972 as No. 2-CIV 41241 and denied on November 14, 1972.

On December 6, 1972, the case was called for trial by jury and assigned to the Honorable Ronald E. Swearinger. At the outset of the trial appellant renewed his motion to strike the prior conviction as constitutionally invalid. The motion was again denied [R.T. 3]. At the outset of trial and out of the presence of the jury, appellant made a motion to suppress evidence, pursuant to the case of *People v. Foulger*, (1972) 103 Cal.Rptr. 156 on the basis that the officer who administered the Breathalyzer test to appellant and the officers who maintained the machine were not the usual operators of the machine on which the test was administered as required by the regulations of the Department of Health, State of California, Sections 436.51-436.63 and the motion was denied after the court received testimony thereon [R.T. 4-26].

After a trial by jury, appellant was convicted as charged on December 7, 1972.

Sentencing occurred on December 18, 1972, after a motion for new trial, based on the trial court's error in not declaring the prior conviction invalid on constitutional grounds, which motion was denied. Sentence was imposed on the basis the prior conviction was valid. Appellant was sentenced, placed on three years' probation after the sentence was suspended on the following conditions:

1. Pay a fine of $350.00 plus a penalty assessment of $72.00;

2. Serve 6 days in the County Jail two days at a time on three consecutive weekends beginning February 2, 1973;

3. Surrender his driver's license in court for a period of one year (which was done);

4. Not operate a motor vehicle in the State of California unless he possessed a valid driver's license; and,

5. Obey all laws and all orders of the Court.

Appeal bond was set at $422.00 which was deposited on January 8, 1973. Notice of Appeal was timely filed on January 8, 1973. Notice to the Clerk to prepare Clerk's Transcript was filed on January 11, 1973. Notice of Appellant's proposed statement on appeal, etc., was also filed on January 11, 1973. Notice by Appellant of filing Reporter's Transcript as a part of the Statement on Appeal was duly served on January 26, 1973. The Statement on Appeal was settled and certified on March 22, 1973. The Record on Appeal was filed on May 25, 1973 and the time for filing Appellant's Brief established at June 8, 1973.

The denials of the appellant's motions by the trial court are reviewable on appeal, Section 1469 of the Penal Code of the State of California.

On appeal to the Appellate Department of the Superior Court of California for the County of Los Angeles the federal question was timely and properly raised in the Appellant's Opening Brief:

> "After several motions before the Court and two petitions for Writ of Mandate to have the prior conviction of appellant declared constitutionally invalid; the trial court found that conviction constitutionally valid (R.T. 147, lines 3-8). The trial court received in evidence People's Exhibit 4, which was a two page certified copy of

the docket sheet in case No. M80311 of appellant's conviction on the prior in Whittier Municipal Court (R.T. 149). People's Exhibit 4 is before this court by virtue of the Clerk's Transcript which designated the People's Exhibits as item 8 for the Record on Appeal.

The Court is referred to People's Exhibit 4 and its attention is directed to the docket entry dated January 20, 1972 covering the arraignment of appellant. That docket entry indicates appellant *was not present in court* when his plea of not guilty was entered. Accordingly, appellant did not hear the court's instruction that he was entitled to confront the witnesses against him; did not have to be a witness against himself; was entitled to a trial by jury and an attorney of his own choosing. Similarly he did not hear the court's instruction regarding the consequences of a guilty plea and accordingly did not respond. Appellant's counsel requested a jury trial.

The second docket entry relevant to this appeal is dated March 10, 1972 and reads as follows:

> '*Deft not appearing* Attorney David Baxley appearing D.D.A. George Palmer appearing *Atty with authority* enters guilty plea written waiver of jury, confrontation, self incrimination.' (Italics added).

The written waiver form referred to in that docket entry appears as Exhibit 6 to the Petition for Writ of Mandate to the Superior Court which was designated for inclusion in the Record on Appeal as item 4 of the Notice to Clerk to Prepare Clerk's Transcript. Reference to the written

waiver reveals that, *if efficacious,* it would waive the constitutional right to be represented by counsel; right to a speedy and public trial by a jury or court; right to be confronted by witnesses and to cross examine them; the right to testify in his own behalf or remain silent; and the privilege against self-incrimination. After each right, in the right hand column, are short spaces for the individual to initial and the form is initialed by appellant. That right hand column is headed with the words 'Deft initial after reading'. The form is signed by appellant and dated March 10, 1972. Appellant's signature is acknowledged by a Notary Public for Los Angeles County, on March 10, 1972. Appellant contends that this waiver *was not efficacious* under the constitutional and decisional law of the State of California and the United States of America and the conviction resulting therefrom is constitutionally invalid.

In *Boykin v. Alabama* (1969) 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709, the United States Supreme Court held it could not be assumed from a silent record that a guilty plea had been voluntarily made and that the constitutional rights necessarily forfeited by such a plea had been freely and intelligently waived.

It has long been the rule that section 7 of article I of the California Constitution requires the *actual speaking of words in open court by the defendant* clearly evidencing his waiver of right to a jury trial in order to effectuate such a waiver. (*In re Tahl* (1969) 1 C.3d 122, 131 (81 C.R. 577; 460 P.2d 449), cert. den., 398 U.S. 911 (90 S.Ct. 1708; 26 L. Ed. 72); *People v. Barnum*

(1957) 147 C.A.2d 803, 808 (305 P.2d 986).) *The waiver may not be made for defendant by his counsel or by inference, but requires the defendant's personal and verbal participation. People v. Evanson* (1968) 265 C.A.2d 698, 700-701, 71 C.R. 503; *People v. Barnum,* supra, 147 C.A. 2d at 809.

Nothing in the opinion in *Tahl, supra,* intimates that there can be a jury waiver without personal appearance and acquiescense of the defendant. To the contrary, the opinion states, at page 131:

> 'California law would seem to require some express courtroom statement by the accused and to preclude waiver by even the most redoubtable inference from the record.'

It seems clear from these cases that no amount of deduction or inferences, however compelling, will support a waiver of the Boykin-Tahl requirements under present California law. The waiver must be *expressed in words* by the Defendant in open court by responses *elicited from the person* of the defendant.

A recent decision from this Court in *People v. Shamrock, Inc.* (1973) Appellate Department of the Superior Court No. CR A 11881 .... C.A. .... is squarely in point. In that case the clerk's transcript demonstrated that on October 20, 1972, defendant corporation was arraigned on a charge of violating section 35.5.1 of Ordinance No. 2361 of the City of Torrance (the Municipal Code) by operating a public place where live entertainment is provided without a written permit; that defend-

ant pleaded not guilty and requested a trial by jury; that on November 21, 1972 defendant was in court with counsel, the cause was called for trial and was 'submitted on the arrest report for a guilty as to corporation'; that the court thereupon adjudged defendant guilty as charged and continued the case to November 29, 1972, for 'submission of written waiver of rights by corporation'; that on the latter date defendant was not in court but appeared by counsel; that there was then filed 'defendant's waiver of constitutional rights and personal presence per in re Tahl'; that defendant thereupon was sentenced to pay a fine, which sentence was suspended and defendant granted probation. The record was clear that although defendant expressly requested a jury trial the case was tried without a jury and without an effective waiver by defendant of its constitutional right to a jury trial.

> In reversing the lower court this court stated: 'The judgment must be reversed for failure of those responsible to turn the square corners required in jury waivers. This conclusion is reached reluctantly because of the waste of judicial time and public funds by the abortive trial. This kind of judicial contretemps, which occurs with unfortunate frequency, might be minimized if the trial courts could find the time, despite their overcrowded calendars, to administer more precisely the procedural aspects of the daily courtroom load.'

To the same effect see *People v. Horak* (1973) Appellate Department of Superior Court of the County of Santa Barbara, No. 97146 .... C.A. .....

In the *Horak* case the court addressed the import of a written waiver and declared it ineffective in the following words:

> 'If the written waiver could be accepted at face value the order appealed from could be affirmed. We do not believe that it can be. Our interpretation of the cases leads us to the conclusion that a written waiver, standing alone, does not satisfy their strict requirements and that there must be, in addition, an orally enunciated waiver from the lips of the accused, or, at the very least, a statement from the mouth of the defendant that he has read the waiver form. Anything less than that requires the court to infer, deduce, and speculate, which is forbidden. *Appellant does not say in the waiver form that he has read it, he did not say in court that he had read it, and people do sign documents without reading them.*' (Italics added).

Based on the docket sheet entries in the prior conviction, Case No. 80311, it is clear that since the appellant did not appear in Court at anytime, appellant was at no time canvassed by the judge nor made aware of his right of confrontation, *right to a jury trial,* and his privilege against self-incrimination, as well as the nature of the charge and the consequences of his plea, in person. Given this record, it seems clear under the authorities cited above that the prior conviction was constitutionally invalid and the trial court failed to perform its duty when it denied appellant's Motion to Strike Prior Conviction on Constitutional Grounds. The trial court's failure to grant the motion results in increased sanctions flowing from his present con-

viction since the court is required under California Vehicle Code 23102(b) to impose a minimum five day mandatory jail sentence; and the Department of Motor Vehicles is mandatorily required to suspend appellant's driver's license for one year under California Vehicle Code 13352(c). Accordingly, appellant respectfully requests this Court to reverse the lower court's order denying the motion."

Petitioner also contended in his appeal that the trial court erred in denying his motion to suppress evidence of the breathalyzer test administered Appellant and in receiving the evidence at trial without a proper foundation being established by the People:

"Since the decision of this Court in *People v. Foulger* (1972) 103 C.R. 156, it is settled law that the People must show compliance with the law, as part of the foundation for admissibility in evidence of the results of Breathalyzer tests in drunk driving cases. At the outset of trial appellant made a motion to Suppress the Results of the Breathalyzer Test administered to appellant. A hearing on that motion was held outside the presence of the jury. The issue at the hearing was whether the administering officer was a usual operator within the meaning of Section 1221.4 and 1222.2 of Title 17, Administrative Regulations of the Public Health Department adopted pursuant to Sections 436.50 through 436.63 of the Health and Safety Code of the State of California (R.T. 4-5).

When the people offered Exhibits 1, 1-A, 2 and 3 into evidence, appellant objected to their receipt on the basis that Instrument 18 was not

properly calibrated and maintained; and that the officer who administered the test was not a 'usual operator' within the meaning of 1221.4(b). This objection was overruled (R.T. 140-144, lines 1-14).

The arresting officer and the same one who administered the test, testified that he used Instrument No. 18 located at the Los Angeles County Main Jail and an ampule from batch 685 in administering the test to appellant on May 6, 1972. He possessed and showed a certificate No. 288 from the California Highway Patrol certifying that he had been trained and had demonstrated competence in the operation of the Breathalyzer. The document was dated November 26, 1968. He could not recall whether he had used Instrument 18 previously, although he stated he had used identical instruments about 2,000 times (R.T. 5-8). At the trial in December he testified that in the entire year of 1972 he had only administered two such tests including the one administered to appellant.

A Mr. J. Raymond Wells testified that he had calibrated Instrument 18 on May 1, 1972 when it was returned to service as a rebuilt unit and again on May 12, 1972. He testified that he had nothing to do with the 'usual operator'. The Regulations, Section 1221.4(b) require the instrument be maintained by testing of unknown samples, either weekly or following every 100 tests of subjects, *whichever comes sooner,* by a usual operator of the instrument, with reports of such tests made to the licensed Forensic Alcohol laboratory which maintains the instrument. Certainly the calibrations on May 1, 1972 and on May 12, 1972 can-

not satisfy the *weekly* requirements of Section 1221.4 (R.T. 9-10, 18).

Mr. Wells testified that on May 5, 1972, an unknown *sample* was run on Instrument 18 by a Deputy Shinn, Badge No. 4168 and the analysis was and should have been .11 percent blood alcohol. He testified further that on May 10, 1972, a Deputy Failes, Badge No. 3744 ran an unknown sample on Instrument 18 and after analysis it tested and should have tested .13 percent blood alcohol (R.T. 12). Section 1221.4(a) requires these instruments to be *calibrated* and maintained periodically by persons who qualify as Forensic Alcohol Supervisors or Forensic Alcohol Analysts in a licensed Forensic Alcohol Laboratory. Section 1221.4(b) requires *maintenance* tests by the usual operator on unknown *samples* at a minimum of weekly. Section 1221.4(c) requires the operators to have received training in the use of the instrument! From the preceding it is clear that a proper foundational basis for receipt of the Breathalyzer test results in evidence was not laid by the people.

Mr. Wells met the requirements to maintain and calibrate the instrument under Section 1221.4(a) and a licensed Forensic Alcohol Supervisor; (R.T. 9), however, his calibrations on May 12, 1972 did not satisfy the weekly maintenance requirements of Section 1221.4(b). Deputy Shinn's maintenance testing on May 5, 1972, is defective for several reasons: (1) Section 1221.4(b) requires that unknown *samples* shall be run weekly. Shinn only ran one *sample;* not the requisite plurality of at least two; (2) There is no showing in the record that Shinn was a 'usual operator' as re-

quired under Section 1221.4(b). The record is void as to whether Shinn had ever ran a test on such an instrument previously; (3) There is no showing in the record that Shinn was qualified by training to conduct analysis on Breathalyzer instruments as required by Section 1221.4(c) or that he was qualified by virtue of the 'grandfather' provision of 1221.4(c)(5).

The same defects are present in the maintenance test conducted by Deputy Bailes. He was not qualified by training or experience; he ran a single test; and he was not a usual operator because he was not qualified (R.T. 12).

The reasonable import of Sections 1221.4(a), (b) and (c) when read together is that maintenance of the instrument must be accomplished by a 'usual operator' on a not less than weekly basis; and, that *samples,* not a *sample* must be tested for adequate maintenance. Furthermore, the usual operator must be qualified under 1221.4 (c). One cannot infer that the term *samples* was an inadvertent choice of words in Section 1221.4 (b). More than one sample reduces the error element and increases the reliability that the machine has adequately measured the blood alcohol content. (R.T. 166, lines 5-16). Since the people did not show that Instrument 18 had been calibrated and maintained in accordance with the requirements of the Health and Safety Code and Regulations issued thereunder, the trial court erred in denying appellant's motion to suppress (R.T. 26 and 140-144, lines 1-14).

Reading of the regulations indicates an overall intent that maintenance testing be accomplished by a 'usual operator'. The term 'usual operator'

is not defined in the regulations; however to be an 'operator' for analysis testing under Section 1221.4 (c) a person must be trained, or qualified by the 'grandfather' provision of Section 1221.4(c)(5). When the term 'usual' is utilized to modify operator we must look to the common ordinary meaning attributed to the word to gain the intention. A common dictionary definition of the term 'usual' is 'habitual or customary'. Accordingly what Section 1221.4(b) means when it uses 'usual operator' is that the operator be the 'habitual or customary operator'. This reflects a clear intention that instruments in a certain location would be used over and over again by the same people and that maintenance testing would test *not only the machine but also the operator.* Thus indirectly, the regulations contain a built in verification test of the operator's continued proficiency gained as a result of training and experience under 1221.4(c)! The testimony of People's witness Mr. Wells supports this conclusion (R.T. 131). By Officer Armenta's own testimony he couldn't recall whether he had ever used Instrument 18 previously. (R.T. 8). At the time of trial he testified that he had only conducted two tests in the eleven months of 1972 that had expired. The People stipulated that Officer Armenta was not a 'usual operator' (R.T. 26). Mr. Wells testified that Officer Armenta did not appear as a 'usual operator' in his records covering the period from April 7, 1972 to August 2, 1972 (R.T. 17).

By the analysis developed above, the Regulations require the 'usual operator' of an instrument to be periodically tested on the Instrument; Section

1221.4(b). Certainly this carries a reasonable implication that random operation of the machine is not contemplated or permissible under the Regulations. Officer Armenta's test of appellant on May 6, 1972 can only be characterized as random. The reasonable interpretation of the Regulation reveals an overall intent that suspects be tested on a calibrated machine, by a proficient test operator maintaining his skill by current, repetitive operation of the same instrument if the results were to be admissible as evidence against the accused. Verification of skill maintenance was to come from maintenance testing of not only the machine but the usual operator also.

Since the record reveals the Regulations were not complied with in this case, the Motion to Suppress People's Exhibits 1, 1-A, 2 and 3 should have been granted.

While there was other evidence presented on the issue of whether the appellant was or was not under the influence of intoxicating liquor, the result of the Breathalyzer test was a significant, if not the most significant, part of the People's case. Enhancing the significance of the Breathalyzer test is the Jury Instruction given from CALJIC 16,834 Drunk Driving—Presumption of Intoxication (C.T.—Docket sheet, page 5). Appellant's test result was .16 percent blood alcohol while the instruction invokes the presumption of only .10 percent.

Accordingly, appellant respectfully requests the judgment of the court below be reversed."

REASONS FOR GRANTING WRIT.

Pursuant to Rule 19 of the rules of this Court Petitioner believes a review of this case is in order to resolve substantial federal questions, based on loss of liberty without due process under Amendments V and XIV of the U.S. Constitution and denial of effective assistance of Counsel under Amendment VI of the U.S. Constitution, were raised by the manner in which the Courts below disposed of his motions at trial and his appeal and the basis on which said disposition was made.

Petitioner contends that his prior conviction was constitutionally invalid because he did not appear in court for either his arraignment at which his Counsel entered a not guilty plea in his behalf and therefore was not advised of his constitutional rights; or at the subsequent proceedings where Counsel entered a guilty plea on his behalf and a written waiver of his constitutional rights purportedly signed by him, in his absence. Petitioner contends that the disposition of his case in the Courts below resulted in a state court deciding a federal question of substance in a way probably not in accord with applicable decisions of this Court in the cases of *Boykin v. Alabama,* (1969) 395 U.S. 283, 23 L.Ed.2d 274, 89 S.Ct. 1709; and *Miranda v. Arizona,* 384 U.S. 436.

In the *Boykin* case, *supra,* this Court held a conviction could not stand by assuming from a silent record that a guilty plea had been voluntarily made and that the constitutional rights necessarily forfeited by such a plea had been freely and intelligently waived. Similarly, *Miranda, supra,* dealt with the waiver of the constitutional privilege against self-incrimination. This Court

held in that case that a waiver of constitutional privileges could not be effectuated by means of a printed form signed by the accused, even though the form recited that he had been fully advised of all his rights and understood them.

In reaching its decision, the Appellate Department undoubtedly relied *erroneously* on the October 1973 decision of the California Supreme Court in the case of *Mills v. Municipal Court,* Sup., 110 Cal.Rptr. 329, which distinguished waiver *procedures* required in felony proceedings from those obtaining in misdemeanor proceedings, such as involved here, after a careful analysis of the *Boykin-Tahl* decisions:

> "5. Conclusion.
>
> To reiterate, we have concluded above that the principles underlying the Boykin-Tahl decisions are applicable to misdemeanor proceedings. We have also indicated that in implementing these principles in the misdemeanor field, the procedure required for felony prosecutions need not be precisely duplicated, but variations may be adopted so long as defendants' fundamental constitutional rights are respected. In particular, we have explained that the application of the Boykin-Tahl rule does not preclude the entry of a guilty plea through counsel, so long as the record explicitly demonstrates the defendant's awareness, and personal waiver, of the constitutional rights relinquished by his plea of guilty. Moreover, we have also recognized that when misdemeanor defendants personally appear in court to enter their pleas, the trial judge may collectively advise such defendants of their constitutional rights so long as ade-

quate evidence of each defendant's personal waiver appears on the record. *Finally, we have held that our present decision is to be applied purely prospectively.*" (Italics added).

By its terms, the *Mills* decision was to be applied purely prospectively, that is, only to guilty pleas entered after the date of the decision. As the guilty plea at issue was made before the *Mills* decision, the full thrust of the *Mills* decision is to *negate the effect* of this Court's decision in *Boykin,* insofar as its safeguards were to have been applied to misdemeanor convictions obtained in California during the period from *Boykin* to *Mills* (1969-1973), therefore denying adequate protection of federal constitutional rights of the accused. Such State action is proscribed by Amendment XIV, U.S. Constitution, and protected by Amendment V of the U.S. Constitution. Accordingly, petitioner respectfully requests this Court to review the matter to determine whether *Boykin* should be reinstated in California for application to misdemeanor convictions in the period from 1969 to 1973, *Boykin* to *Mills.*

Secondly, petitioner seeks review of the procedural defect that resulted in his being denied the opportunity to argue the merits of his case through counsel before the Appellate Department. A hearing on the appeal was set for July 12, 1973 and petitioner's Counsel was present when the case was called for argument. The decision on the *Mills* case was then pending and Counsel for Respondent suggested deferment of argument until the *Mills* case was decided and this was concurred in by petitioner's Counsel and the Court. The *Mills* decision occurred in October of 1973 and a new hearing date was never set. Rather, the Appellate Depart-

ment issued its decision denying the appeal on December 11, 1973 without hearing argument from Counsel [Ex. A].

Petitioner then filed a timely Petition for Rehearing and an Application for Certification to the District Court of Appeal for the Second Appellate District of the State of California:

> "Appellant in the above-entitled appeal on which a decision was rendered and entered on December 11, 1973, and received by appellant on December 12, 1973, respectfully requests a rehearing and application for certification to District Court of Appeal, and that said decision be reversed on the following grounds:
>
> 1. The hearing on the appeal was set by the court for July 12, 1973 at 9:30 A.M. At said hearing the parties agreed that this case would be held to be argued and then submitted upon the court receiving the decision in the case of *Mills v. Municipal Court,* Sup., 110 Cal.Rptr. 329. Appellant understood that upon receiving the *Mills* decision this case would be reset on calendar and counsel would be permitted to argue prior to submission (a) the point in the *Mills* case and (b) the point in the case of *People v. Foulger* (1972) App., 103 Cal. Rptr. 156, 26 Cal. App.3d Supp. 1, and the *California Administrative Code,* Title 17, Sections 1222.2, 1221.4, (a), (b) and (c), as presented in his Brief. Counsel understood that argument would be permitted after the *Mills* decision and Appellant did not rely on *Mills;* it was the Respondent who requested deferment of argument *subsequent* to *Mills* decision and

Appellant concurred. It should be noted that *Mills* applies prospectively only by its own terms, Sup., 110 Cal.Rptr. 332, 343-345.

2. *California Rules of Court,* Rule 107(a) permits the court to order a rehearing at any time before the appellate department's judgment becomes final. The judgment in the instant appeal will not become final pursuant to (b) (1) until the expiration of seven days after its pronouncement and is stayed by this petition for rehearing, which is timely filed.

3. If a rehearing is not granted or the court feels it cannot change its position, we request based on the above, that in accordance with the *California Rules of Court,* Rule 63(a) and (c) that this court certify this case to the District Court of Appeals for appellate review.

WHEREFORE, appellant respectfully submits that this petition for rehearing be granted, and that this cause be reset for argument thereon; or that the court certify the matter to the District Court of Appeal.

Dated: December 17, 1973."

This petition and the application for certification were denied December 28, 1973 [Ex. B]. An appeal to the Court of Appeal does not lie unless the Appellate Department certifies transfer or the Court of Appeal on its own motion determines to transfer from an opinion of the Appellate Department published or to be published (no such opinion was written here) in Advance California Appellate Reports, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law. California Rules

of Court 62(a). Since neither condition exists in petitioner's case, the judgment of the Appellate Department, the denial of a rehearing and the denial of certification make the Appellate Department's decision that of a State Court of last resort as to petitioner.

Petitioner contends that the Appellate Department's refusal to set his case for oral argument constitutes a denial of due process under Amendments V and XIV of the U.S. Constitution and denied him the effective assistance of Counsel guaranteed by Amendment VI, U.S. Constitution. As shown in the Statement of the Case; *supra;* the *Boykin* issue was not the only issue raised on appeal. Conceding, *arguendo* only, that *Mills* may have been dispositive of the *Boykin* issue; it is clear that *Mills* had no applicability and did not address the issue of whether the Breathalyzer test results should have been suppressed at trial. As a minimum, petitioner should have been accorded the right to argue his position on that issue in the Appellate Department before judgment or on timely petition for rehearing. This right was denied petitioner by the lower Court's action.

Prayer.

For the reasons stated above, petitioner prays the writ will issue.

Dated: March 8, 1974.

LESLIE A. KAST,
Attorney for Petitioner.

EISCHEN & KAST, INC.,
Of Counsel.

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 12082

Trial Court No. M 62755

FILED

DEC 11 1973

CLERK, Superior Court

BY L. SMITH, DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

CLIFFORD ARTHUR FORKERT,
Defendant and Appellant.

ON APPEAL
from the
MUNICIPAL COURT
of the
Alhambra
Judicial District,
County of Los Angeles,
State of California.
Ronald E. Swearinger, Judge
(23102(a) VC)

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the Judgment made and entered in the Municipal Court of the Alhambra Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

BY THE COURT DEC 11 1973

Presiding Judge.

Judge.

sd

FILED

DEC 28 1973

CLARENCE [illegible], County Clerk

BY L. SWAIN, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. CLIFFORD ARTHUR FORKERT, Defendant and Appellant.	Superior Court No. CR A 12082 Municipal Court of the Alhambra Judicial District No. M 62765 ORDER DENYING REHEARING AND DENYING CERTIFICATION

The petition of appellant for a rehearing after judgment of this court on appeal and petition for certification of cause to the Court of Appeal in the above-entitled case having been filed and having been duly considered,

Said petitions are hereby denied.

Dated DEC 28 1973

BY THE COURT

Presiding Judge

Judge

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 31 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1379

CLIFFORD ARTHUR FORKERT,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

JOSEPH P. BUSCH
District Attorney of
Los Angeles County

HARRY B. SONDHEIM
Head, Appellate Division

DONALD J. KAPLAN
Deputy District Attorney

CHARLES E. BOAG
Deputy District Attorney

849 S. Broadway, 11th Floor
Los Angeles, California
Telephone: (213) 974-5915

Attorney for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1377

CLIFFORD ARTHUR FORKERT,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

---

STATEMENT OF THE CASE AND FACTS

Throughout the Petition for Writ of Certiorari a number of factual assertions are recited regarding the procedures that occurred from the inception of this case until the filing of the Petition. The Petition also sets out various evidentiary assertions as to what occurred in the trial court below. Rather than restating in detail all procedural facts and evidence below, we deem it sufficient for purposes of this response to the Petition to point

out our view of certain relevant factual assertions[1] in the Petition with which we disagree and to set out relevant matters that were either omitted by petitioner or that may require clarification.

Petitioner recites on page 8: "On September 27, 1972 the case was called for jury trial. On appellant Forkert's motion the docket sheet in error refers to Motion to Strike Prior Conviction on Constitutional Grounds as follows, 'proceedings proceeded as to motion to suppress pursuant to Section 1538.5 Penal Code'." However, the docket entries for September 27, 1972 only state: "on Defendant's Motion proceedings proceeded as to motion to suppress pursuant to Section 1538.5 Penal Code." (Docket No. M 062765, Municipal Court of the Alhambra Judicial District, County of Los Angeles, State of Calfifornia,[2] entry for Sep. 27, 1972.) Thus, not only does the docket not support the representation that this was a Motion to Strike a Prior Conviction but it affirmatively rules out that possibility because

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1. There are a number of factual assertions in the Petition with which we disagree, but which would not appear material to the present proceedings.

2. Docket No. M 062765 is hereinafter referred to as "Docket."

it states that this motion was made pursuant to California Penal Code section 1538.5. Under California law, all section 1538.5 motions to suppress are restricted to Fourth Amendment grounds (e.g., see People v. Smith [1969] 70 Cal.2d 123, 128) and of course a motion to strike prior convictions does not entail the Fourth Amendment, nor do the principles enumerated in Boykin v. Alabama [1969] 395 U.S. 238, 89 S.Ct. 1709, 86 L.Ed. 1302, or in In re Tahl [1969] 1 Cal.3d 122.

On pages 11 and 12, petitioner discusses his written waiver of rights and written plea of guilty filed with the Municipal Court of the Whittier Judicial District on March 10, 1972, which of course is the prior conviction that is the subject of the Petition. In the discussion, petitioner refers to some of the statements in that document that he initialed but omits mentioning others that we deem highly material. For example, petitioner does not mention that he initialed statement number 1, that reads: ". . . I understand that I am charged with the offense of 23102 A-. . . .", statement number 7, which reads: ". . . I have thoroughly [emphasis added] discussed the charge(s), the facts and the possible defenses with my attorney and he has advised

me to plead guilty to the above offense(s).", and statement number 8: ". . . I have personally initialed each of the above boxes and I understand [emphasis added] each and every one of the rights outlined above and I hereby waive [emphasis added] or give up each of them in order to enter my guilty pleas to the above charge. I am entereing [sic] a plea of guilty because I am in fact guilty and for no other reason." "Dated: March 10, 1972 Signed: Clifford W. Forkert Defendant." (DEFENDANT'S WAIVER OF CONSTITUTIONAL RIGHTS FOR GUILTY PLEA TO A MISDEMEANOR, dated March 10, 1972, signed and notarized Clifford W. Forkert, defendant.[3]) Also omitted in the Petition is statement number 9, found on the second page of that document and which was signed by petitioner's attorney, that reads: ". . . I am attorney of record and I have explained [emphasis added] each of the above rights to the defendant, and having explored the facts with him/her and studied his/her possible defenses to the charge(s) I concur in his/her

3. DEFENDANT'S WAIVER OF CONSTITUTIONAL RIGHTS FOR GUILTY PLEA TO A MISDEMEANOR is hereinafter referred to as "Written Waiver of Rights," and is Item 4 of the Clerk's Transcript on Appeal, and a People's exhibit received in evidence by the trial court on September 27, 1972.

decision to waive the above rights and to enter a plea of guilty. I further stipulate that this document may be received by the court as evidence of defendant/s intelligent waiver of these rights and that it shall be filed by the clerk as a permanent record to that waiver, I have witnessed the reading of this form by the defendant and the initiallings and signature upon it. Dated: March 10, 1972 Signed: David Baxley Attorney". (Id.)

Commencing on page 13 and continuing through page 16 of the Petition, petitioner cites portions from two cases, People v. Shamrock, Inc. [1973] CR A 11881, and People v. Horak [1973] No. 97146, and argues that they support his contention that the prior conviction (of March 10, 1972) was constitutionally infirm. Petitioner refers to these two cases by their respective filing numbers only, rather than by citation to the Official Reports of California, since neither of these cases was certified for publication. While we do not agree that these cases support petitioner's contentions, we do object to any reference to , or use of, them by petitioner; they are unpublished decisions and as such may not, under California law, be cited by any party

(except the litigants in those cases) for any purpose in any action. (Emphasis added.) (California Rules of Court, Rule 977.) Moreover, we note that one of these decisions, i.e., People v. Horak, was rendered by the Appellate Department of the Superior Court of Santa Barbara County, rather than the County from which the Petition arose, and accordingly even if it were a published opinion it would not be binding on the Appellate Department of the Superior Court of Los Angeles County (e.g., People v. Alves [1957] 154 Cal.App.2d Supp. 877, 880; C.I.T. Corp. v. Biltmore Garage [1934] 3 Cal.App.2d Supp. 757, 762).

Beginning on page 16 and concluding at the end of page 21, petitioner restates verbatim that portion of his Appellant's Opening Brief,[4] that was filed in the Appellate Department of the Superior Court of Los Angeles County and which sets out his arguments below regarding the admissibility of the breathalyzer result. Within these pages of the Petition, and intertwined with the argument then made by petitioner, are a number of factual assertions. In the

4. Appellant's Opening Brief is hereinafter cited as "A.O.B."

interest of brevity we will not set out in detail here our view of the facts embodied in the Reporter's Transcript in this matter. Instead we respectfully direct this Court's attention to pages 2-8 of our Respondent's Brief which was filed in the Appellate Department of the Superior Court of Los Angeles County in response to petitioner's Appellant's Opening Brief, and which is now part of the record before this Court.[5]

Petitioner, under the heading "Reasons for Granting Writ" on page 22 of the Petition, states: "Petitioner contends that his prior conviction was constitutionally invalid because he did not appear in court . . . at the subsequent proceeding where Counsel entered a guilty plea on his behalf and a written waiver of his constitutional rights purportedly signed by him, in his absence." (Emphasis added.) To the extent that petitioner may be suggesting by the word "purportedly" that it is not his signature on the DEFENDANT'S WAIVER OF

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5. We have been in contact with the Clerk of the Appellate Department of the Superior Court of Los Angeles County, and it is our understanding that all documents filed with the Appellate Department in this matter below were forwarded to the United States Supreme Court.

CONSTITUTIONAL RIGHTS FOR GUILTY PLEA TO A MISDEMEANOR, dated and filed with the Municipal Court of the Whittier Judicial District of Los Angeles County on March 10, 1972, we take exception. Not only did petitioner not object to the admission of a certified copy of this document into evidence in the trial court during a pre-trial hearing on September 27, 1972 (Docket, entry for Sep. 27, 1972) but on December 7, 1972, during the course of the jury trial before the same judge, petitioner stipulated that he had been convicted of a violation of section 23102(a) on March 10, 1972 in the Municipal Court of the Whittier Judicial District and that he was in fact the defendant described in a certified copy of Docket No. M 80311 of that court (e.g., id. entry for Dec. 7, 1972). Thereafter, petitioner was found guilty by the jury of the charge and the allegation of the prior conviction of March 10, 1972. (Emphasis added.) (See e.g., id.) Docket M 80311 recites that a Clifford Arthur Forkert authorized his attorney, David Baxley, to enter a plea of guilty to section 23102(a) on March 10, 1972 in the Municipal Court of the Whittier Judicial District, that such a plea was entered, and that Clifford Arthur Forkert's

written waivers were duly filed. (See Docket No. M 80311, Municipal Court of the Whittier Judicial District, County of Los Angeles, State of California, entry for Mar. 10, 1972.[6]) THE DEFENDANT'S WAIVER OF CONSTITUTIONAL RIGHTS FOR GUILTY PLEA TO A MISDEMEANOR form was of course completed and signed by a Clifford Arthur Forkert on March 10, 1972 (Written Waiver of Rights, first page, statement number 8) whose signature was duly notarized on that same date (id., second page), and which of course was also signed on March 10, 1972 by a David Baxley, attorney (id., first page; second page, statement number 9), and this form was filed with the Municipal Court of the Whittier Judicial District (id., second page, stamp of Earl Trigon, Clerk). Moreover, Appellant's Opening Brief, which was filed below with the Appellate Department of the Superior Court and which was signed by petitioner's present attorneys, Joseph Calvin Eischen and Leslie A. Kast (A.O.B., page 15, lines 17-24), recites, to name just a few examples: "The trial court

6. Docket No. M 80311 is Item 8 of the Clerk's Transcript on Appeal and is People's exhibit 4 admitted during the jury trial below.

received in evidence People's Exhibit 4, which was a two page certified copy of the docket sheet in case No. M 80311 of appellant's conviction on the prior in Whittier Municipal Court. . . ." (emphasis added) (id., page 5, lines 9-13); "The written waiver form referred to in that docket entry . . . was designated for inclusion in the Record on Appeal as item 4 . . . . Reference to the written waiver reveals that, ... After each right, in the right-hand column, are short spaces for the individual to initial and the form is initialed by appellant. That right-hand column is headed with the words 'Deft initial after reading.' The form is signed by appellant and dated March 10, 1972. Appellant's signature is acknowledged by a Notary Public for Los Angeles County, on March 10, 1972." (emphasis added) (id., page 6, lines 6-21). Finally, these recitals in Appellant's Opening Brief are reproduced verbatim in the Petition on pages 11 and 12 (as is the whole of Appellant's Opening Brief below on pages 4 through 21 of the Petition.)

ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THE APPELLATE DEPARTMENT'S RULING THAT THE PETITIONER'S PRIOR CONVICTION WAS CONSTITUTIONALLY VALID

The March 10, 1972 prior conviction challenged by petitioner was of course for a misdemeanor charge, and initially we recognize that this Court has never ruled that the principles enumerated in Boykin v. Alabama [1969] 395 U.S. 283, 23 L.Ed.2d 274, 89 S.Ct. 1709, are applicable to misdemeanors. We also note that the California Supreme Court in Mills v. Municipal Court and People v. Superior Court (Wicks) [1973] 10 Cal.3d 288, has made Boykin mandatory in California to all misdemeanor pleas, except to traffic infractions (Mills and Wicks, 10 Cal.3d at 302, fn. 13), of guilty or nolo contendere (id., 298, fn. 7) by represented defendants (id., 292, 297-299, 301-302, 307, 311), at least as to such pleas entered after October 25, 1973 (id., 308-311). (Emphasis added.)

Whether or not these principles were required of misdemeanor pleas entered in

California prior to October 25, 1973[7], petitioner certainly cannot urge that he was not accorded the full benefit of them at the time of his 1972 plea. The record below "on its face" unequivocally shows that petitioner was fully advised of all the constitutional rights required by Boykin v. Alabama, and its California progeny, Mills and Wicks and In re Tahl [1969] 1 Cal.3d 122, and that he voluntarily and knowingly waived these rights, and further that a complete written record of both the advisements and waivers was made and filed with the trial court that accepted his plea of guilty on March 10, 1972. (See: e.g., Written Waiver of Rights.) Not only does a complete written record exist as to the advisements and waivers but the petitioner himself has initialed that record as to each, and then signed it, and indeed his own attorney, who presumably was mindful of

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7. It should be noted, as does the California Supreme Court, that a number of post-Boykin, and even earlier, California decisions either applied, or suggested the application of, some or all of these principles to misdemeanors prior to Mills and Wicks. (E.g., 10 Cal.3d at 291 and fn. 1, 298 and fn. 7, 301 and fn. 10, 302 and fn. 12, 303, 306 and fn. 16, 307 and fn. 17, 309; and citations therein.)

petitioner's best interests, also signed it.

Thus, whether the result of appellate mandate or the exercise of a particular trial court's discretion, petitioner *in fact* received all that is required under *Boykin*. Petitioner is therefore necessarily limited to arguing that the *form* of the advisements received and the waivers given, and the *form* of their record, was constitutionally ineffective, a proposition with which we strongly disagree. Assuming *arguendo* that *Boykin* applied to misdemeanor pleas in 1972, it is clear that the administration of rights, and the taking of waivers, in writing and through counsel, without the necessity of the defendant being present at time of plea, is constitutionally *superior* to an in court advisement and taking of waivers, verbally administered by a trial court judge,[8/]

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8. Although a state can never limit or restrict a federal constitutional right of its citizens, it can of course always enlarge or broaden such a right for the benefit of its citizens. Thus, assuming that *Boykin* was in fact applicable to misdemeanor pleas in 1972, it would be wholly permissible under the Federal Constitution for a California court in the exercise of its own supervisory or constitutional powers, albeit a trial court, to require more than is required by *Boykin* and to utilize procedures superior to the minimum requirements set out under *Boykin*.

for a number of reasons. First, and as pointed out in Mills and Wicks, the entry of such pleas through counsel and in writing is wholly consistent with the purposes and rationale of Boykin v. Alabama (and In re Tahl, 1 Cal.3d 122), namely of insuring that the defendant is fully aware of his constitutional rights and has voluntarily and knowingly waived them, and of insuring that an adequate record of such has been made (Mills and Wicks, 10 Cal.3d at 288, 291, 297-302, 305, 308, 311). Further, as the California Supreme Court points out, not to permit entry of such pleas to misdemeanors through counsel and in writing is at odds with both federal and California law. (Emphasis added.) (Id. 304 and fn. 14.) While in felony proceedings under federal law, as well as under California statutes, the defendant must be present in court to enter a felony plea, defendants in misdemeanor prosecutions have a statutory right in California to enter a plea through counsel in their absence, and similarly have that option under the Federal Rules of Criminal Procedure. (Id. and citations thereunder.) Thus, it should not be forgotten that in a misdemeanor proceeding it is solely the defendant himself, and not the court or

prosecution, who decides if the plea is to be made in person or by counsel, and hence in all cases written pleas through counsel will be wholly the result of the defendant's own choice. (Emphasis added.) (Id., 302-311.) As was also noted in Mills and Wicks, to require a misdemeanor defendant to come back to court for no other reason than to enter an effective guilty plea will, in many instances, impose a greater burden on him than will the punishment for the crime itself. (Id.) Furthermore, not to permit misdemeanor pleas through counsel can only force very serious burdens on the administration of justice for most, if not all, trial courts of misdemeanor jurisdiction, in light of the virtual multitude of misdemeanor cases that are processed through such courts daily. (Id.)

The opinion in Mills and Wicks discusses other valid reasons why the procedure of written pleas through counsel is preferable. However, aside from that comprehensive discussion by the California Supreme Court, we submit that as a matter of common sense such pleas better implement the principles of Boykin, than those entered in person orally before a trial court. When a defendant in the more leisurely setting of

his attorney's office, or at least not in a crowded din of a misdemeanor court, reads a printed list of his rights and thereafter waives them in writing, and in addition does all this in the immediate presence of his own attorney who counsels him as to the meaning of each right and the import of each waiver, can it be seriously believed that this procedure does not produce a far more voluntary and intelligent understanding and waiver of constitutional rights than does an in court, purely verbal, procedure before a judge? Not only will the judge invariably administer these rights from the bench verbally and in rapid fire manner, leaving little opportunity for the defendant to seek an explanation -- if indeed he even hears each of them -- except perhaps to quickly turn to his attorney standing next to him, but the verbal waivers given in return will also suffer the same infirmities.[9] Moreover, in most instances misdemeanor court

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9. Of course, in a number of instances, particularly when the plea is made pursuant to a plea bargain, prosecuting attorneys rather than the judge will verbally administer the rights and take the waiver in open court. What has been said above concerning verbal advisements by the court is no less applicable to the judicially supervised, but prosecutorial exercise, of this function.

rooms present to defendants and other laymen nothing short of a picture of chaos and noise, and in the course of one day a misdemeanor trial judge may administer such rights, and seek waivers thereof, that number in the hundreds, some of which will be given on an individual basis to a defendant and others of which will be given in masse to a number of defendants. Similarly, when a defendant executes a form such as the one now before this court, and thereafter his attorney executes the same form acknowledging that he has not only administered but explained each right, each consequence, and each waiver, this certainly produces a superior written record within the meaning of Boykin than does the recordation in a trial court docket, whether by stamps or in longhand, by a harried court clerk, amid the noise and confusion of a misdemeanor court, and who may in a single day have to make hundreds of entries in a number of dockets.

In the alternative, and assuming arguendo that Boykin did not apply to misdemeanors in 1972, then petitioner's plea was accompanied by more than was constitutionally required, however effective or not

effective its form may have been[10/], and hence on the Boykin issue the Petition fails to demonstrate any right in need of vindication or to state any justiciable controversy.

In addition to the foregoing, it should be noted that the California Supreme Court in Mills and Wicks had before it a written, misdemeanor "change of plea" form prepared by the Municipal Court of the San Diego Judicial District and which was the vehicle for an entry of plea through counsel and in the defendant's absence. (Id., 295.) On that form the defendant acknowledged the advisement of his rights, his waiver of them, and other matters, and his attorney likewise executed and signed the form acknowledging that he had instructed his client on the various rights, consequences, and waivers. (Id., 312-313.) Since the California Supreme Court totally approved both the content of the "change of plea" form and its use through counsel (id., 304-306), and

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10. As has already been touched on at footnote 8, page 13, supra, it does not run afoul of the Federal Constitution for a state to enlarge a federal constitutional right of its citizens. Hence, assuming that Boykin did not apply to misdemeanors in 1972, a California court, even a trial court, could properly broaden the scope of Boykin to include misdemeanors.

since that form is identical in all material respects to the form executed by petitioner herein and his attorney of record, it is clear that had petitioner's written plea through counsel been entered after October 25, 1973 its validity under California standards would be unassailable. But if unassailable after the California Supreme Court affirmed that Boykin applies to misdemeanors, then a fortiori it would necessarily be even less assailable in 1972 when Boykin's standards were supposedly less strictly applied to misdemeanors in California.

Finally, the California Supreme Court's refusal in Mills and Wicks to give Boykin mandatory retroactive application as to misdemeanor pleas does not raise a substantial federal issue. Assuming that Boykin does not apply to misdemeanors under the Federal Constitution, or at least did not apply to them prior to the decision in Mills and Wicks, then obviously this issue is moot since the Federal Constitution then would not preclude California from adopting a prospective or a retroactive approach to Boykin or from simply rejecting it altogether. On the other hand, assuming, without conceding, that Boykin does apply to misdemeanors, it is nevertheless clearly permissible for a

state court to implement Boykin prospectively vis-a-vis misdemeanors. The Boykin decision itself involved a felony, yet even as to felony application that decision did not preclude prospective implementation only. Moreover, since the underlying prophylactic purpose of Boykin by its very nature suggests only prospective effect, a fortiori extension of that underlying purpose to misdemeanors implicitly presumes only prospective treatment. Indeed, we know of no post-Boykin decision from this Court that has even intimated that state implementation of Boykin principles could not be prospective only. In contrast, several decisions of this Court, involving in part Boykin principles, have by their language indicated a prospective effect only. (E.g., Argersinger v. Hamlin [1972] 407 U.S. 25, 40, 32 L.Ed.2d 530, 540, 92 S.Ct. 2006, 2014.) Lastly, and significantly, this Court's own three prong standard for determining whether constitutional rights will be imposed retroactively or only prospectively, ipso facto permits prospective only imposition of Boykin to misdemeanors (see, Halliday v. United States [1969] 394 U.S. 813, 832, 23 L.Ed.2d 16, 19, [89 S.Ct. 1498]), and indeed these very standards were properly

applied to misdemeanors by the California Supreme Court in Mills and Wicks to arrive at the same conclusion (10 Cal.3d at 308-311).[11]

II

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY PETITIONER'S CONTENTION THAT HE SHOULD HAVE BEEN PERMITTED TO REARGUE HIS POSITION BEFORE THE APPELLATE DEPARTMENT AFTER THE MILLS AND WICKS DECISION HAD BEEN RENDERED

Petitioner contends in effect that he was denied due process in not being permitted to reargue his position before the Appellate Department of the Superior Court after it had received the California Supreme Court's decision in Mills and Wicks. In support of this contention petitioner makes a number of factual representations to the effect that the Appellate Department explicitly agreed to stay proceedings until the Mills and Wicks decision had been received, and explicitly agreed to thereafter permit all parties to argue their position in light of

11. Earlier, but after the decision in Boykin v. Alabama was rendered by this Court, the California Supreme Court similarly used this federal standard to conclude that Boykin principles would not be retroactively applied to felonies in California. (In re Tahl, 1 Cal.3d 122, 133-135.)

that decision. While we agree with petitioner that the Appellate Department agreed to stay its decision in the instant matter until it had had an opportunity to read the opinion in Mills and Wicks which was then pending, we do agree that the Appellate Department went further and agreed to withhold decision until it not only had received the Mills and Wicks opinion but it also had recalendared the matter and heard further argument by the parties.[12/] Not only do the latter representations of petitioner as to what purportedly occurred below not

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12. The record, we believe, supports our view of what transpired below, namely that at our request and with petitioner's concurrence the Appellate Department agreed to withhold its decision until it had read Mills and Wicks; that prior to oral argument in July 1972 both parties had already filed all briefs permitted by the California Rules of Court; and that at the close of oral argument in July 1972 both parties submitted their case with the singular understanding that the Appellate Department would, on its own, read Mills and Wicks before rendering a decision.

Perhaps it should be pointed out that when an advocate "submits" his case to a court for decision that universally connotes that he has "rested" his case -- which is the end of the matter.

appear to be internally consistent[13], or

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13. The Petition on page 24 states in effect that it was agreed to defer argument until the case of Mills and Wicks had been decided, and thereafter a new hearing date was to have been set by the Appellate Department. Similarly, on page 25 petitioner states: "Appellant understood that upon receiving the Mills decision this case would be reset on calendar and counsel would be permitted to argue prior to submission (a) the point in the Mills case, and (b) the point in the case of People v. Foulger. . . .", which is taken verbatim from petitioner's PETITION FOR REHEARING AND APPLICATION FOR CERTIFICATION TO DISTRICT COURT OF APPEALS, at page 3, lines 13-21, filed with the Appellate Department of the Superior Court and which is now part of the record before this Court. Yet, in that same Petition for Rehearing at page 3, lines 9-13, and which is also reproduced verbatim in the Petition to this Court on page 25, petitioner states: "The hearing on the appeal was set by the court for July 12, 1973. . . . At said hearing the parties agreed that this case would be held to be argued and then submitted upon the court receiving the decision in the case of Mills. . . ." (Emphasis added.) This last statement, while not entirely clear, seems to say that at the time of oral argument this matter was deemed, i.e., held, to have been argued and submitted once Mills and Wicks had been received and read by the Appellate Department. To the extent our interpretation of this statement is correct it is inconsistent with petitioner's other representations as to what occurred and indeed is supportive of our view of the record below.

logical[14], but we can find absolutely nothing in the record below to support them.[15] Since it is axiomatic that a reviewing court cannot consider matters (factual or

14. Petitioner also states that the Appellate Department explicitly agreed to permit argument both as to the Boykin issue and as to the People v. Foulger issue (viz., admissibility of the breathalyzer result) after the Mills and Wicks opinion had been received. (Emphasis added.) (Brief for Respondent in Opposition to Petition for Writ of Certiorari, page 23, footnote 13, supra; Petition for Writ of Certiorari, page 25; Petition for Rehearing, page 3, lines 13-21.) Since Boykin, and Mills and Wicks, do not, in any way whatsoever, bear on the Foulger issue raised below, there is no conceivable reason for the Appellate Department to postpone a decision on that issue until Mills and Wicks had been received, or to reopen argument on that issue after the receipt of Mills and Wicks.

15. In contrast, the very fact that the Appellate Department below denied the Petition for Rehearing (which contained precisely the same factual representations as are set out in the Petition before this Court) may indeed itself be some evidence that these representations are not correct. After all, the court that reviewed the Petition for Rehearing on its merits is the very court that supposedly agreed some five months earlier to permit further argument after Mills and Wicks had been rendered.

otherwise) not embodied in the record below[16], and since it is equally fundamental that to the extent the record below is silent, ambiguous, or contradictory all presumptions and inferences must be found in support of the judgment below by the reviewing court[17], we accordingly submit that petitioner's representations (and of course the contention that they are supposed to support) are not only improperly before this court but are in fact moot.[18]

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16. E.g., People v. Jablon [1958] 165 Cal.App.2d 348, 350, citing cases; People v. Moore [1955] 137 Cal.App.2d 197, 204; also see, e.g., People v. Hardeman [1966] 244 Cal.App.2d 1, 21, citing cases.

17. E.g., People v. Redmond [1969] 71 Cal.2d 745, 755; People v. Sweeney [1960] 55 Cal.2d 27, 33; Lerno v. Obergfell [1956] 221 Cal.App.2d 221, 223-224; People v. Bates [1954] 126 Cal.App.2d 144, 145-146; Riley v. Dunbar [1942] 55 Cal.App.2d 452, 455; also see e.g., People v. Newland [1940] 15 Cal.2d 678, 681; People v. Hanggi [1968] 265 Cal.App.2d Supp. 969, 971-972, citing cases.

18. Even assuming, without conceding, that there is in fact some support in the record for petitioner's contention we believe that it nevertheless would lack merit. First, we know of no constitutional requirement, whether under a due process rubic or otherwise, that precludes a court from refusing the further filing of briefs, further arguments, etc., once each party, as they did here, had an opportunity to file at least one brief and to orally argue their

[fn. 18 continued on page 26.]

III

THERE IS NO FEDERAL QUESTION PRESENTED BY THE APPELLATE DEPARTMENT'S REFUSAL TO SUPPRESS THE BREATHALYZER RESULT

Petitioner suggests that the case of People v. Foulger [1972] 26 Cal.App.3d Supp. 1, and the regulations embodied in Group 8, Subchapter 1, Chapter 2 of Title 17, of the California Administrative Code, which are implemented pursuant to California Health and Safety Code sections 436.50 through 436.63, involve constitutional questions, and therefore the refusal to suppress the breathalyzer result in the instant

(fn. 18 continued)

position at least once. Obviously, to permit otherwise opens the door to never ending rehearings, rearguements, and the filing of supplemental briefs, since invariably an advocate, even after he has "rested" his case, will think of some point he forgot to raise or will discover some new (or old) authority he should have cited, ad infinitum. Secondly, once a party has been given an opportunity to be heard and regardless if he has "rested" or not, the decision to permit him to later present new matters or argument, or reopen if he has "rested," is always within the sound discretion of the court that he is before. The exercise of that discretion, whether judicious or not, is governed by local court rules and/or state statutes but certainly does not entail any federal constitutional questions.

matter supports the Petition for Writ of Certiorari. However, People v. Foulger concerns only the effect of noncompliance with these regulations on the admissibility of breathalyzer results, and a review of that opinion (People v. Foulger, 26 Cal.App.3d Supp. 1-6) as well as the regulations (17 California Administrative Code, Chapter 2, Subchapter 1, Group 8, sections 1215-1222.2), fails to expose any federal or constitutional questions. Moreover, in People v. Brannon [1973] 32 Cal.App.3d 971, the Court of Appeal for the Fifth Appellate District of California reviewed People v. Foulger, and in a well reasoned and unanimous decision, also concluded, inter alia, that noncompliance with the regulations under Group 8 of Title 17 of the California Administrative Code raised no constitutional issue and indeed that the case of People v. Foulger itself did not turn on constitutional grounds. (People v. Brannon, 32 Cal.App.3d 971, 975-976, 977-978.)[19]

19. We wish to also point out that not only does People v. Foulger not raise federal questions, but its reasoning has been explicitly overruled as being erroneous by the Court of Appeal in People v. Brannon. (32 Cal.App.3d at 971, 977-978.) Since any Court of Appeal opinion prevails over any Appellate Department of the Superior Court

[fn. 19 continued on page 28]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH P. BUSCH
District Attorney

By

HARRY B. SONDHEIM
Head, Appellate Division

DONALD J. KAPLAN
Deputy District Attorney

CHARLES E. BOAG
Deputy District Attorney

Attorney for Respondent

(fn. 19 continued)

decision under California appellate law (Auto Equity Sales, Inc. v. Superior Court [1962] 57 Cal.2d 450, 455), Foulger cannot be regarded as viable any longer in California. Aside from criticisms expressed in Brannon, Foulger has also been attacked as being diametrically opposed to the California Legislature's strong policies regarding the admission of evidence (see, e.g., California Evidence Code section 351, and Law Review Commission Comments thereunder), and as being in contradiction to other decisional law of California (see, e.g., People v. Wren [1969] 271 Cal.App.2d 788, 791-792; People v. Fite [1968] 267 Cal.App.2d 685, 690-691). (See, e.g., 56 Ops. Cal. Atty. Gen. [1973] 38, 40.) Other aspects of People v. Foulger are set out in Respondent's Brief, pages 2-12 which is now part of the record before this Court, and we respectfully direct this Court's attention to that brief.